

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, Linda Breathitt,
and Nora Mead Brownell.

ISO New England, Inc.	Docket No. EL00-62-035
ISO New England, Inc.	Docket No. EL00-62-041
ISO New England, Inc.	Docket No. EL00-62-042
Mirant Americas Energy Marketing, Inc. v. ISO New England, Inc.	Docket No. EL01-123-000

ORDER ON COMPLAINT
AND COMPLIANCE FILINGS

(Issued April 15, 2002)

In this order, the Commission addresses a complaint filed by Mirant Americas Energy Marketing, Inc., et al. (Mirant) against ISO New England, Inc. (ISO-NE) regarding its Installed Capability (ICAP) requirement. We also address three compliance filing made by ISO-NE in Docket Nos. EL00-62-035 relating to ISO-NE's ICAP requirement. The Commission denies Mirant's complaint and rejects in part the compliance filing in Docket No. EL00-62-035 on the basis that those filings are moot. The Commission rejects the remainder of the compliance filing in Docket No. EL00-62-035 on the basis that it is an improper Section 205 filing rather than a compliance filing. The Commission accepts in part and rejects in part the compliance filing in Docket No. EL00-62-041 and accepts the compliance filing in Docket No. EL00-62-042. This order benefits New England customers because it will contribute to a well-functioning ICAP market in New England.

Background

To ensure system reliability, each Load Serving Entity (LSE) within the New England Power Pool (NEPOOL) is required to purchase sufficient ICAP (i.e., installed electric capacity that it owns or controls) each month to meet its allocation of the total NEPOOL ICAP requirement. An LSE which fails to fulfill its ICAP requirement is assessed an ICAP deficiency charge.

Since August 2001, the Commission has issued a series of orders addressing the question of when an LSE must procure its ICAP requirement, as follows:

A. August 28 Order: On June 4, 2001, ISO-NE made a filing in which it proposed to revise certain NEPOOL market rules relating to ICAP. While previously LSEs had been required to purchase their entire ICAP requirement prior to the start of each month, in its new filing ISO-NE proposed, among other things, to require LSEs to purchase only 95 percent of their ICAP requirement prior to the start of each month, and allow a two-week "cure period" after the month within which each LSE could make up the remaining 5 percent.

On August 28, 2001, the Commission issued an order accepting ISO-NE's new ICAP regime in part.¹ However, the Commission rejected ISO-NE's proposal as to the cure period:

ISO-NE acknowledges, and we agree, that ideally the ICAP requirement should be established ahead of time so participants know exactly how much ICAP they need, and so that participants can purchase ICAP ahead of time. However, under the [proposed] plan, while LSEs would be required to purchase most of their ICAP requirement prior to each month, the ICAP responsibility would continue to be calculated after the month. Thus, participants would be required to guess their ICAP requirement in advance and would be penalized if they guess wrong.²

B. November 20 Order: In an order on rehearing of the August 28 Order, on November 20, 2001, we rejected ISO-NE's interpretation of the August 28 Order.³ ISO-NE did not eliminate the cure period, but instead proposed a new policy to allow participants to secure up to 100 percent of their ICAP requirement during a cure period. On a going-forward basis, we required ISO-NE to revise its ICAP market rules so that each LSE's ICAP requirement would be calculated prior to the month to which it would apply.

[W]e reject ISO-NE's interpretation of the August 28 Order, as it relates to an end-of-the-month ICAP cure allowance. . . . ISO-NE's initial proposal in this proceeding to permit a 5 percent cure allowance, or any other proposal

¹ISO New England, Inc., 96 FERC ¶ 61,234 (2001) (the August 28 Order).

²August 28 Order, 96 FERC at 61,943.

³ISO New England, Inc. 97 FERC ¶ 61,212 (2001) (November 20 Order)

which would increase this allowance in lieu of the forward purchase of ICAP, is . . . unworkable, because the eligibility of a supplier to deliver ICAP is determined not during the cure period, but in the preceding month. As such, there would be no assurance that ICAP suppliers would be available to supply ICAP during the cure period, making any such proposal risky and unwarranted. The proper way to address the present disconnect between the knowledge of the ICAP requirement and the obligation to purchase ICAP is to calculate the requirement prior to the beginning of the month and require that all ICAP be likewise purchased in advance.

The Commission then required ISO-NE to make a compliance filing within 30 days to implement a 100 percent advance purchase requirement for ICAP.

C. February 1 Order: In response to several requests for rehearing of the November 20 Order, on February 1, 2002, the Commission again stated that it would not reconsider the provision of the NEPOOL Market Rules requiring LSEs to procure 100 percent of their ICAP obligation for each month by the last day of the preceding month, without a cure period.⁴ The Commission noted that the effect of its August 28 and November 20 Orders was to keep in place NEPOOL's currently effective market rules, until the Commission acted on the compliance filing required by the November 20 Order.

Filings Addressed in this Order

A. ISO New England, Inc., Docket No. EL00-62-035. In response to the August 28 Order, ISO-NE made a compliance filing on September 27, 2001. It stated that, since the Commission had denied its proposal to require LSEs to purchase 95 percent of their monthly ICAP requirement prior to each month, but to allow LSEs to purchase the remaining 5 percent during a cure period at the end of the month, ISO-NE would eliminate the 95 percent advance purchase requirement, and allow LSEs to purchase 100 percent of their ICAP requirement during the cure period. ISO-NE also eliminated elements of its ICAP regime that had been rejected by the Commission in the August 28 Order (the "good behavior" discount, where LSEs received a 20 percent discount for their ICAP deficiency charge if they were not deficient in the prior month, and ISO-NE's market assessment and settlement proposal), and moved the calculation of an LSE's ICAP deficiency from Market Rule 11 to Section 11.6.1. It also submitted conforming changes to Sections 4.2.2 and 4.3.2 of Market Rule 4 regarding the timelines for submitting bilateral contracts for internal transactions, so that they now refer back to

⁴ISO New England, Inc., 98 FERC ¶ 61,103 (2002) (the February 1 Order).

the ICAP Trading Deadline defined in Section 11.2.2, and made changes to Appendix B of Market Rule 20 to implement the 100 percent cure period.

In addition to these changes, ISO-NE further added new language to Section 11.3.2 to make clear that, if an ICAP unit does not comply with the \$1,000/MWH Bid Commitment Price, ISO-NE will modify the bids to ensure that they comply.⁵ ISO-NE submits that these changes to Market Rules 4, 11 and 20 are within the scope of the compliance filing. If, however, the Commission should determine otherwise, ISO-NE makes this portion of the filing under Section 205 of the Federal Power Act (FPA).⁶

B. Mirant v. ISO-NE, Docket No. EL01-123-000. In this complaint, Mirant alleges that, as of September 1, 2001, despite the Commission's rejection of the cure period concept in its August 28 Order, ISO-NE nevertheless unlawfully implemented a two-week cure period. Mirant asserts that the August 28 Order does not change the current NEPOOL Market Rules, and ISO-NE must therefore continue to apply those rules

⁵If in an hour an ICAP unit fails to comply with the Bid Commitment Price for some bid blocks but not for the first bid block, the ISO will apply the energy bid price of the highest consecutive bid block that complies with the Bid Commitment Price to all higher numbered bid blocks.

If, for an hour, an ICAP unit has both low and higher bids that are conforming, but has mid-range and highest bids that are not, ISO-NE will apply the highest conforming block price in the low range to the mid-range blocks and the highest conforming bid to the highest non-conforming blocks.

If a unit fails to comply with the Bid Commitment Price for all bid blocks in an hour, a multiplier will be applied by the ISO to each of the 3-part bid parameters (Cold Start-Up Price, No-Load, and Energy Block Bid). The multiplier will be applied to the Energy Block Bid for each bid block in the hour and to the Cold Start Up Price and No Load for every hour of the Dispatch Day. The multiplier will also be applied to the Hot Startup Price if necessary to prevent the Hot Startup Price from exceeding the Cold Startup Price. The multiplier is calculated for each hour for a unit as: 1000 divided by the Bid Commitment Price (without regard to whether or not it exceeds \$1000) as calculated above. The smallest multiplier calculated for an hour is applied to each bid block in the hour to maintain the requirement that all bid blocks have consistently increasing bids.

⁶16 U.S.C. § 824d (1994).

and require LSEs to buy 100 percent of their anticipated ICAP requirements on a forward basis, with no opportunity for cure.⁷

C. ISO New England, Inc., Docket No. EL00-62-041. In response to the November 20 Order, ISO-NE made a compliance filing on December 20, 2001 in which it proposed to create an ICAP regime allowing for 100 percent of each LSE's ICAP responsibility to be purchased on a forward basis.

ISO-NE states that, to determine each LSE's ICAP requirement, ISO-NE (a) calculates the total amount of ICAP necessary to meet New England's needs and (b) allocates that total requirement among LSEs. ISO-NE alleges that this second step is problematic, because unlike in the other two northeastern independent system operators (ISOs), PJM and the New York ISO (NYISO), in New England the mix of customers served by each supplier is not known until after the fact. ISO-NE states that the infrastructure to perform daily tracking of load shifts is not yet in place because of the "disaggregation" of load reporting, tracking and billing responsibility that has resulted from "New England regulatory requirements and its wholesale market evolution."⁸ According to ISO-NE, no single set of organizations in New England is able to calculate the impacts of load shifting. ISO-NE states that Assigned Meter Readers (largely transmission owners) are responsible for reading meters and providing the hourly loads of each Load Asset (aggregation of loads) to ISO-NE on a daily basis. But because of confidentiality provisions, the Assigned Meter Readers do not know which supplier or suppliers serve each Load Asset. Also, some load assets are "last resort" or "standard offer" service – customer groupings which may be the responsibility of several suppliers, on a percentage basis. The contracts that assign a wholesale supplier to each Load Asset or portion of a Load Asset are submitted to ISO-NE on a confidential basis, and only ISO-NE's settlement process tracks responsibility from Load Asset to supplier.

ISO-NE asserts that currently this process only tracks energy costs and responsibility. ISO-NE currently allocates total ICAP responsibility within the pool among LSEs by assigning a portion of ICAP responsibility to each Load Asset, and then, through its settlement process, determining which LSE or LSEs are responsible for each

⁷Since in its November 20 Order the Commission explicitly rejected a cure period, ISO-NE suspended billing of ICAP between September and November. The compliance filing in Docket No. EL00-62-042, as discussed infra, addresses this problem and proposes a solution.

⁸ISO-NE compliance filing in Docket No. EL00-62-041 at 4.

Load Asset, and then assigning ICAP responsibility to individual LSEs on that basis.⁹ Thus, the allocation of ICAP, which is allocated on monthly peak load, cannot be known until after the fact.

ISO-NE states that, because New England is unable to allocate ICAP responsibility until after the fact, the calculation of an advance purchase requirement for ICAP must be made on the basis of historical data. Therefore, the approach proposed in this filing does not account for load shifts that occur after the calculation is made. ISO-NE states that it cannot accommodate load shifts in the same manner as NYISO because the New York market is based on a central market mechanism (*i.e.*, all transactions are between participants and the ISO itself), whereas the New England market is based on bilateral transactions, so there is no visible market price at which to value an after-the-fact reallocation of ICAP responsibility. Similarly, ISO-NE states that it cannot accommodate load shifts as PJM does because daily load data is not available.¹⁰

ISO-NE therefore states that it must find a way to accommodate load shifts to ensure fairness to those LSEs who have lost and gained load and further asserts that, in order to accommodate load shifts, an after-the-fact cure period will be necessary. It references its compliance filing in Docket No. EL00-62-035, which provides for such a cure period. ISO-NE recognizes, however, that in the November 20 Order, the Commission rejected its proposed cure period and required ISO-NE to modify its ICAP requirement, consistent with the advance purchase obligations currently in place in PJM and NYISO.¹¹ From September 1, 2001 through November 2001, ISO-NE administered its ICAP market without an advance purchase requirement and allowing a cure period for 100 percent of each LSE's obligation.¹²

As its compliance proposal, ISO-NE submits an interim proposal to implement a 100 percent advance purchase requirement, which it states should become effective not

⁹ISO-NE compliance filing in Docket No. EL00-62-041 at 5.

¹⁰Further, PJM has a daily capacity credits market that allows its participants to sell and obtain ICAP during the supply period.

¹¹ISO-NE also notes that on December 3, 2001, it made a compliance filing (since docketed as Docket No. EL00-62-039) in which it proposes to retain its current ICAP requirement for the time being, and implement a full advance purchase requirement that is similar to that in PJM and NYISO simultaneously with its implementation of Standard Market Design (SMD).

¹²See supra note 7.

less than 45 days following the Commission's approval of the proposal. It also asserts that this proposal will provide accommodation of load shifts, to the extent possible given existing settlement mechanisms.

ISO-NE proposes to use the month two months prior to each Supply Month as a Base Month to set each LSE's obligation for the Supply Month. Each LSE's responsibility will be determined by dividing the LSE's actual contribution to peak load for the Base Month by NEPOOL's peak load for Base Month. Then this figure is multiplied by the total ICAP requirement of the pool for the Supply Month.

ISO-NE will communicate each LSE's ICAP responsibility to its participants by the fifth calendar day of the month prior to the Supply Month. The participants have five days to review the load calculations and submit corrections. Participants may also submit any Load Asset contracts that will transfer all or part of the associated ICAP responsibility to another LSE for the Supply Month by the end of the twelfth calendar day of the month before the Supply Month. ISO-NE will then adjust each LSE's ICAP responsibility to reflect submitted corrections (to the extent they are accepted) and Load Asset contracts, and will communicate each LSE's final ICAP responsibility to participants by the fifteenth calendar day of the month prior to the Supply Month. ISO-NE states that it cannot accommodate load shifts occurring later than that.

ISO-NE's proposal allows, however, for one exception. ISO-NE states that when states require the rebidding of contracts for standard offer or last resort service, state regulatory commissions must sometimes approve the new supplier before the contract goes into effect after the rebidding process, and those approvals have often been delayed until the last minute. ISO-NE states that, because this is a small class of large load shifts, it believes that it can accommodate these load shifts until the day prior to the Supply Month.

ISO-NE states this proposal is not equivalent to the advance purchase requirements in PJM or NYISO because it is based on data that is a month old and, with the exception of state-mandated rebids, cannot accommodate subsequent load shifts. Also, there is no cure mechanism. ISO-NE asserts, however, that this proposal provides complete advance certainty with "as little inequity as can currently be achieved."

D. ISO New England, Inc., Docket No. EL00-62-042. In the February 1 Order, the Commission ordered ISO-NE to make a compliance filing discussing ICAP obligations for the period from September through November 2001, including relevant data relating to such obligations, and also directed ISO-NE to make recommendations for resolving any disputes relating to the settlement of ICAP obligations for this period.

In its compliance filing made on February 15, 2002, ISO-NE states that only a small percentage of ICAP resources were submitted to the ICAP market during the cure periods for September, October and November. ISO-NE recommends that the Commission allow the cure periods to be effective for this three-month period, on the basis that understandable doubt existed among ISO-NE and its participants as to whether a cure period could be utilized, and because ICAP purchasers, on an aggregate basis, made a good-faith effort to satisfy nearly all of their ICAP obligations before the beginning of the monthly supply period.

Notice, Interventions, Comments and Answer

ISO New England, Inc., Docket No. EL00-62-035. Notice of ISO-NE's compliance filing in Docket No. EL00-62-035 was published in the Federal Register, 66 Fed. Reg. 51649 (2001), with protests and interventions due on or before October 29, 2001. TransCanada Power Marketing, Ltd. (TCPM) filed a timely motion for intervention. The Maine Public Utilities Commission (Maine Commission) timely filed comments. The Industrial Energy Consumer Group (IECG), Mirant, the NRG Companies (NRG) and Duke Energy North America, LLC, et al. (Duke) timely filed motions to intervene and comments or protests. FPL Energy LLC and Sithe New England Holdings, LLC (FPL/Sithe) filed a protest one day out of time, and also sought to be allowed to make this filing.

Mirant v. ISO-NE, Docket No. EL01-123-000. Notice of Mirant's complaint in Docket No. EL01-123-000 was published in the Federal Register, 66 Fed. Reg. 51420 (2001), with answers, protests, and interventions due on or before October 18, 2001. ISO-NE timely answered the complaint, and moved to dismiss the complaint, or, in the alternative, to consolidate it with Docket Nos. EL00-62-034 and EL00-62-035. Mirant filed an answer to the motion to dismiss. The New England Conference of Public Utilities Commissioners (NECPUC), the Vermont Department of Public Service, and the Maine Commission timely filed motions to intervene and motions to dismiss the complaint. TCPM, Power Development Company (Power Development), NSTAR Electric and Gas Corporation (NSTAR), National Grid USA (National Grid), Central Maine Power Company (Central Maine) and FPL/Sithe timely filed motions to intervene and comments and protests.

ISO New England, Inc., Docket No. EL00-62-041. Notice of ISO-NE's compliance filing in Docket No. EL00-62-041 was published in the Federal Register, 67 Fed. Reg. 583 (2002), with comments, protests, and interventions due on or before January 22, 2002. The Maine Commission and Calpine Eastern Corporation (Calpine) timely filed comments. TCPM, AES New Energy, et al. (AES), the NEPOOL Participants Committee (NEPOOL) and PG&E National Energy Group, et al. (PG&E),

the Massachusetts Municipal Wholesale Electric Company (MMWEC) and the New Hampshire Electric Cooperative (NHEC) timely filed motions to intervene and comments or protests. The Vermont Public Power Supply Authority (VPPSA), NRG, and Constellation Power Source (Constellation) timely filed protests. ISO-NE filed a response to the pleadings of PG&E and NRG and asked the Commission to accept its response.

ISO New England, Inc., Docket No. EL00-62-042. Notice of ISO-NE's compliance filing in Docket No. EL00-62-042 was published in the Federal Register, 67 Fed. Reg. 9445 (2002), with comments, protests, and interventions due on or before March 8, 2002. The Maine Commission and the Bangor Hydro-Electric Company (Maine/Bangor) and NRG timely filed comments or protests. NEPOOL timely filed a motion to intervene.

Discussion

A. Procedural Matters

Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2001), the notices of intervention and timely, unopposed motions to intervene of the parties serve to make them parties to this proceeding. We will permit FPL/Sithe to file its protest in Docket No. EL00-62-035 one day out of time on the basis that such late filing here will not prejudice any other party.

Pursuant to Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2001), no answer may be made to a protest absent the permission of the decisional authority. We will accept ISO-NE's answer to PG&E's and NRG's filings in Docket No. EL00-62-041 on the basis that it provides additional facts which have been useful in our decision-making process.

B. Section 205 Issues and Rules Changes

In Docket No. EL00-62-035, NRG asserts that changes in Market Rule 11 that ISO-NE seeks to make go beyond compliance with the Commission's August 28 Order, and should be rejected on that basis, since the Commission generally does not allow a utility to make a new Section 205 filing together with a compliance filing. In Docket No. EL00-62-041, some parties (NHEC, Calpine) assert that ISO-NE must make a Section 205 filing to put into place its 100 percent advance purchase requirement.

As to Docket No. EL00-62-035, the Commission accepts all other rules changes, but rejects the clarifying language added to Section 11.3.2 of Market Rule 11 to make

clear what will occur if a participant does not comply with the \$1,000/MWH Bid Commitment Price for ICAP. As NRG points out, the Commission generally does not permit a utility to combine a compliance filing with an unrelated tariff filing under Section 205. ISO-NE has not demonstrated why this change to Section 11.3.2 is necessary to fulfill the compliance obligation placed on ISO-NE by the August 28 Order. Rather, it appears to be an unrelated tariff change. The Commission therefore rejects the changes to Section 11.3.2 of Market Rule 11 in this filing, without prejudice to ISO-NE's refiling those changes.¹³

As to Docket No. EL00-62-041, the Commission will not require ISO-NE to make a new Section 205 filing to put its 100 percent advance requirement into place. The November 20 Order required ISO-NE to implement an advance purchase requirement. ISO-NE has done so in its Docket No. EL00-62-041 compliance filing. Therefore, its filing does not go beyond the compliance obligation placed on it by the November 20 Order, but rather fulfills that obligation.

C. 100 Percent Advance Purchase Requirement

We accept the reinstated 100 percent advance purchase requirement filed by ISO-NE in Docket No. EL00-62-041. As we stated in our August 28 Order, "ideally the ICAP requirement should be established ahead of time so participants know exactly how much ICAP they need, and so that participants can purchase ICAP ahead of time."¹⁴ ISO-NE's filing accomplishes this purpose. Under this approach, an LSE can avoid deficiency charges by purchasing its entire ICAP responsibility for each month prior to that month.

D. Cure Period

As the Commission's rulings in the November 20 and February 1 Orders make clear, we did not and will not approve a cure period for LSEs to meet their ICAP responsibility, and reiterate that under ISO-NE's ICAP program, LSEs must obtain 100 percent of their ICAP responsibility by the last day of the preceding month. We therefore dismiss as moot Mirant's complaint in Docket No. EL01-123-000. We also reject those portions of the compliance filing in Docket No. EL00-62-035 that provide for an after-the-fact cure period, and also state in response to TCPM's and AES's comments in Docket

¹³We also note that the particular changes to Market Rules 4 and 20 that ISO-NE made to implement the 100 percent cure period have become moot, and we are therefore not accepting those rule changes.

¹⁴August 28 Order, 96 FERC at 61,943.

No. EL00-62-041 that we will not require ISO-NE to revise its forward purchase requirement by implementing a cure period.

With regard to the compliance filing in Docket No. EL00-62-042, however, we will allow a cure period to be effective solely for the limited period from September to November 2001. Maine/Bangor states that the Commission should not penalize the customers of LSEs who reasonably relied on what they considered to be the only logical interpretation of the August 28 order, while the NRG Companies urge the Commission to reject the filing and assess ICAP deficiency charges during this period. In fact, ISO-NE acted precipitously in allowing a 100 percent cure period to go into effect before its compliance filing in Docket No. EL00-62-035 was accepted, and this problem could have been avoided absent such precipitous action. This is particularly the case given that, as ISO-NE itself concedes, there was a disagreement among ISO-NE and some of its members as to the Commission's intent. Given the short time frame involved, three months, the Commission will not penalize those LSEs who operated in good faith under the assumption that an after-the-fact cure period was available.

E. Base Month Method for Allocating ICAP Responsibility

A number of commenters took issue with ISO-NE's method of allocating total ICAP responsibility to each Participant as stated in Docket No. EL00-62-041, particularly the two-month lag between the allocator and the supply period. VPPSA states that the use of a lagging allocator is unjust and unreasonable by making LSEs' obligations in peak months a function of load in shoulder months. The Maine Commission states that the proposed ICAP scheme does not reasonably relate a supplier's obligation to its actual sales level, because it is based on historical purchases and usages and therefore places unnecessary risk and cost on LSEs. Other commenters including MMWEC and TCPM urge that seasonality be taken into account. MMWEC also raised a concern that the rule is not definitive in stating whether non-coincident or coincident peak load is to be used in the proposed allocation method. VPPSA also requests that the Commission put in place a forward ICAP market with allocations of capability responsibility fixed in advance and based on estimated participant load for the relevant period.

We reject the use of the Base Month alone to determine each LSE's ICAP responsibility, as proposed by ISO-NE. This method uses an allocator for ICAP that is based on the participants' load two months prior to the ICAP period in question and assumes that load ratios remain constant two months later. Therefore, it does not take into account seasonal changes in the pool's overall load profile, nor does it take into account the fact that each LSE's load may shift seasonally as well, so that each LSE's separate load would be a different percentage of the total load. The ISO should allocate ICAP requirements by the fifteenth calendar day of each month, as proposed. We will, however,

require ISO-NE to develop a method to determine LSEs' ICAP responsibility that takes into account seasonal load factors of the Supply Month, (whether by using the Base Month and in some reasonable manner taking into account these seasonal factors, or otherwise), and to specify the factors to be used in the market rules (including specifying whether the allocation is to be based on the coincident peak load or on each participant's non-coincident peak load), and we direct ISO-NE to make such a filing within 30 days. At that point, ISO-NE may renew its request for a 45-day period to put its new method into place, and we will consider that request at that time.

F. Load Shifting and Different Treatment of Different Customers

ISO-NE states that it cannot accommodate load shifts that take place (or of which it is informed) any later than the twelfth calendar day of the month prior to the Supply Month. ISO-NE does, however, state that it can accommodate the "small class" of state-mandated load shifts as late as one day before the start of the Supply Month.

Several parties note that this proposal does not take into account load shifting that occurs both prior to the Supply Month (after the twelfth calendar day of the month preceding the Supply Month) and during the Supply Month itself. They claim that when one LSE loses load to another LSE, the customers of the LSE that gains the load will not have to meet the ICAP obligation associated with that shifted load, and will be, in essence, free riders at the expense of customers of the LSE that loses the load but is still subject to the ICAP obligation for the shifted load. Constellation and other parties state that load shifting will cause cross-subsidization among LSEs. Other commenters (MMWEC, Calpine) suggest that the transfer of ICAP obligations that relate to load shifting can be accomplished bilaterally via contracts, and PG&E asserts that ISO-NE will not create the infrastructure for collecting the necessary data to implement an accurate forward purchase requirement absent a direct order from the Commission.

Commenters further criticize the preferential accommodation of state-mandated load shifts. Calpine states that accepting those load shifts until one day before the Supply Month creates "super-stakeholders" and that this aspect of the filing should be rejected. NRG similarly states that if load shifting of certain customers can be accommodated in less time, then the ISO should account for all load shifts that occur up until three days before the Supply Month. MMWEC states that the potential for one-day notice to adjust ICAP is at odds with the Commission's directive that participants be made aware in advance. VPPSA notes that the one-day notice given for certain large load shifts is not the kind of advance planning that the Commission had in mind.

1. Accommodating load shifts before the start of the Supply Month. The Commission views the lack of ability for LSEs to take into account and to adjust their

ICAP for retail load shifts, both shortly before and during the Supply Period, as a serious problem in New England's ICAP market.

As to accommodating load shifts that occur before the start of the Supply Month, ISO-NE states that it cannot account for load shifts that occur after the twelfth day of the month preceding the Supply Month. We do not find convincing ISO-NE's assertion that the fact that it must obtain load data from several different sources, on a confidential basis, makes it impossible for ISO-NE to update the ICAP responsibility for each LSE any later than the twelfth calendar day of the preceding month. Specifically, we are not convinced that ISO-NE could not enable all the relevant participants to communicate the necessary data to ISO-NE, and then use that data to allocate ICAP responsibility among LSEs (both functions to be performed electronically, we assume), in a significantly speedier fashion. We also recognize that, as ISO-NE has stated in its answer to PG&E's and NRG's pleadings in Docket No. EL00-62-041, a change in one LSE's ICAP responsibility could potentially cause changes to several other LSEs' ICAP obligations as well. Nevertheless, this still does not mean that ISO-NE could not adjust all of its LSEs' ICAP obligations, on a pool-wide basis more quickly than it is doing now.

We therefore require ISO-NE to make a compliance filing within 30 days providing that, in the month preceding the Supply Month, ISO-NE will accommodate load shifts up to a smaller, more reasonable number of days prior to the start of the Supply Month, taking into account both ISO-NE's ability to collect and process relevant load shift data and the LSEs' ability to meet their ICAP responsibility prior to the start of the Supply Month. Some possible mechanisms that may be worth considering have been suggested by the parties – for instance, VPPSA suggests an after-the-fact reconciliation,¹⁵ and Calpine suggests that LSEs be required to make contractual adjustments to their ICAP responsibility as part of load shift arrangements. Or, ISO-NE could simply require all load shifts to take effect only on the first day of a calendar month, and only if notice of the shift was provided to ISO-NE by the fifteenth calendar day of the prior month. We encourage ISO-NE to develop innovative and appropriate mechanisms for making these changes.

¹⁵VPPSA notes that this after-the-fact reconciliation would be different from the cure period that the Commission has already rejected. A cure period, as originally envisaged by ISO-NE, would allow LSEs that have only purchased 95 percent of their ICAP responsibility to avoid paying a deficiency charge by purchasing the remaining 5 percent during a two-week cure period following the Supply Month. Under VPPSA's proposal, deficiency charges would still be assessed if an LSE did not purchase 100 percent of its ICAP responsibility, as allocated to it by ISO-NE at that time, prior to the beginning of the Supply Month. VPPSA Protest at 4, fn. 2.

We also deny the provision that allows exceptions for ISO-NE to adjust ICAP responsibility resulting from state-mandated load shifts up until the day before the supply period. We are concerned that certain customers could thus receive different, more favorable treatment because of size or retail market structure specific to certain locales. We therefore require ISO-NE in its compliance filing to provide for similar treatment for all classes of load shifts.

2. Accommodating load shifts during the Supply Month. In addition to knowing their ICAP responsibility prior to each Supply Month, so as to be able to avoid deficiency charges, LSEs should also be able to adjust their ICAP responsibilities during each Supply Month, so as to avoid free-rider problems, and this is not possible without up-to-date information. (PJM and NYISO transmission owners track individual customers, their ICAP obligation, and their load profile, and report that data to the ISOs on a daily basis; PJM and NYISO then have different methods of accommodating load shifts within each month – NYISO accounts for load shifts at the end of each month, at the last auction price for ICAP established prior to the supply period, and PJM has a daily capacity credits market to accommodate changes in its LSEs' need for ICAP.) We also believe that the inability to make intra-month adjustments is preventing a fully robust ICAP market from forming in New England.

Based on ISO-NE's filing in Docket No. EL00-62-039, which we are not ruling on in this order, we recognize that ISO-NE is attempting to develop a mechanism to accommodate intra-month shifts, and that it is seeking to enable convergence with either PJM's or NYISO's ICAP mechanisms. We also note that, in that filing, ISO-NE states that it proposes to implement ICAP improvements concurrently with its implementation of its Standard Market Design (SMD) by the first quarter of 2003.¹⁶ We direct ISO-NE, in its 30-day compliance filing here, to report to the Commission on its progress in achieving these goals, including a timetable as to when it believes these improvements will be filed with the Commission – certainly no later than the implementation of SMD. Given the filing that ISO-NE made in Docket No. EL00-62-039 and the discussions as to ICAP currently taking place among the northeast ISOs, it would appear that ISO-NE should be in a position to implement a robust ICAP market no later than January 1, 2003.

G. Convergence with NYISO and PJM

Several parties have raised the question of whether ISO-NE's filing in Docket No. EL00-62-041 moves sufficiently in the direction of converging with other northeast ISOs. We accept the filing with the modifications noted above; however, we also note that this is

¹⁶ISO-NE filing in Docket No. EL00-62-039 at 3, 17.

not the desirable end-state for a truly robust ICAP market. ISO-NE's filing does satisfy certain interim concerns that we addressed in previous orders – namely, a forward purchase requirement that allows LSEs to see their obligations and have the ability to address these obligations before the start of the supply period – but, by ISO-NE's own admission, it also contains limitations. We are hopeful that continuing RTO discussions in the Northeast will develop proposal(s) to be submitted to us in the not-too-distant future that will result in more seamless ICAP markets.

The Commission orders:

(A) The compliance filings in Docket Nos. EL00-62-035 and EL00-62-041 are rejected, as discussed above.

(B) Mirant's complaint in Docket No. EL01-123-000 is dismissed as moot, as discussed above.

(C) The compliance filing in Docket No. EL00-62-042 is accepted, as discussed above.

(D) ISO-NE is hereby directed to submit a compliance filing consistent with the discussion above, within 30 days of the date of this order.

By the Commission. Commissioner Brownell concurred with a separate statement to be issued later.

(S E A L)

Magalie R. Salas,
Secretary.